Supreme Court, U.S.
FILED
NOV 19 1999
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No. 99-679

In The

Supreme Court of the United States

CHARLES D. CONOVER, III,

Petitioner,

v.

FERNALD ENVIRONMENTAL RESTORATION MANAGEMENT CORP., FLUOR DANIEL, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT G. STACHLER
Counsel of Record
DOREEN CANTON
KERRY P. HASTINGS
TAFT, STETTINIUS & HOLLISTER LLP
1800 Firstar Tower
425 Walnut Street
Cincinnati, OH 45202-3957
(513) 381-2838

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

3818

QUESTION PRESENTED

1. Should this Court deny certiorari when the decision below does not raise the question presented and the petition instead would require this Court to make a fact-specific determination regarding the sufficiency of the evidence?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Fluor Corporation is publicly held. Fluor Enterprises, Inc. (formerly known as Fluor Daniel, Inc.) is a wholly owned subsidiary of Fluor Corporation. Respondent Fluor Daniel Fernald, Inc. (formerly known as Fernald Environmental Restoration Management Corporation ("FERMCO")) is a wholly owned subsidiary of Fluor Enterprises, Inc.

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STATEMENT OF THE CASE

After Robert Skalka, Joseph Balnites, William Ponsock and Petitioner Charles Conover were discharged in a large reduction in force, they filed a joint lawsuit against Respondents claiming age discrimination under federal and Ohio law and breach of contract under Ohio common law.

After a trial, a jury found that Petitioner and Skalka were discriminated against because of their age, but rejected the age discrimination claims of Balnites and Ponsock. The jury found in favor of all four plaintiffs with respect to their breach of contract claims.

Respondents moved for judgment as a matter of law because the jury's verdict was not supported by sufficient evidence. The district court granted Respondents' motion with respect to Petitioner's breach of contract claim, but denied the motion with respect to all other claims.

Respondents appealed to the United States Court of Appeals for the Sixth Circuit. Petitioner cross-appealed from the entry of judgment as a matter of law for Respondents as to his breach of contract claim. The Sixth Circuit held that the evidence at trial was insufficient with respect to Petitioner's age discrimination claim and the breach of contract claims of all four plaintiffs. The Sixth Circuit found that Skalka's age discrimination verdict was supported by sufficient evidence, but remanded the damages award for calculation of a remittitur.

Petitioner filed a petition for certiorari on an issue not raised before or decided by the Sixth Circuit. The Sixth Circuit did not require a showing of "pretext plus."

The Sixth Circuit's fact-specific determination that Petitioner's "evidence" of age discrimination was insufficient does not present any issues warranting this Court's review.

STATEMENT OF THE FACTS

Although Petitioner recites the same "facts" and "evidence" considered and rejected by the Sixth Circuit, the actual evidence at trial was different than Petitioner portrays. Petitioner was lawfully discharged, along with 126 other employees, in a large reduction in force at the U.S. Department of Energy's Fernald site.

The Fernald site is located in northwestern Hamilton County, Ohio. The federal government owns the site, but various contractors have operated it. From the 1950's until 1985, National Lead of Ohio operated the site under contract with the federal government to produce enriched uranium metal. National Lead of Ohio's contract expired at the end of 1985, and Westinghouse took over the production work for three more years. Eventually, however, the government directed Westinghouse to stop producing enriched uranium metal at Fernald, and the site was designated for environmental clean-up.

While Westinghouse did preparatory work, the Department of Energy sought a restoration management contractor to handle the clean-up. In 1992, Respondent Fluor Daniel Fernald, Inc. (formerly known as Fernald Environmental Restoration Management Corporation) ("FERMCO") entered into a five-year contract with the government. After a transition period, FERMCO replaced

Westinghouse on December 1, 1992. At that time, FERMCO hired many employees (including Petitioner) who had been working at the site for Westinghouse or various subcontractors.

Initially, the Department of Energy told FERMCO that it could expect $2.2 billion in funding over the next five years. FERMCO hired employees in reliance on this anticipated funding level. But in the spring of 1993, the government asked FERMCO to make projections based on the assumption that it would receive $600 million less over that period. In light of this expected 27% budget cut, on April 29, 1993, FERMCO notified employees that some of them might lose their jobs as a result of the anticipated budget cuts.

To help it select whom to discharge, FERMCO developed a "forced ranking" process and trained managerial personnel in its use. FERMCO's executive management first identified five company-wide "values" on which all salaried employees would be rated. Within each of FERMCO's twenty divisions, salaried employees were then divided into "peer groups," and supervisory personnel identified four "essential skills" for each peer group. Supervisory personnel then rated each employee on the five company-wide "values" and on the four "essential skills" applicable to that employee's peer group. Within each peer group, employees were ranked on the basis of these ratings.

FERMCO's executive management determined the number of employees who would be cut from each division. Taking into account the results of the forced ranking

process, division managers then determined which particular employees would be terminated involuntarily in the reduction in force.

In 1992, Petitioner was manager of procurement for Westinghouse at the Fernald site. When FERMCO took over the clean-up, Al Valdez initially made Petitioner manager of subcontracts. The subcontracting was more complex and involved higher dollar values than ordinary procurement, and Conover struggled with the new job. In February, 1993, because of problems with certain subcontracts, Valdez hired Gwen Nalls as manager of major subcontracts and moved Conover back to the procurement area as a supervisor or "group leader" (one level below manager). Conover and another group leader named Eric Meuser wound up reporting to Lou Henke, who had previously been underneath Petitioner, but who became the new manager of procurement.

Meanwhile, Nalls hired three new group leaders – Paul Simons, Donald Liepold, and Paul Sturgeon – to work under her on subcontracts. All three had extensive experience with government procurement. Unlike Petitioner, all three had been designated by the National Contract Management Association as Certified Professional Contract Managers. Liepold was also a fellow in that organization, which is the highest designation that it can give to a contract professional.

In the "forced ranking" process a few months later, the five group leaders (Petitioner, Meuser, Simons, Liepold, Sturgeon) constituted one peer group. Nalls rated the group leaders (Simons, Liepold, Sturgeon) who

reported to her, and Henke rated the group leaders (Petitioner, Meuser) who reported to him; Nalls and Henke then reviewed a summary of their ratings with their boss, Al Valdez. On a scale of 0 to 5, Sturgeon, Liepold and Simons all scored above 4.30, while Meuser got a score of 3.02. Petitioner's score of 2.58 was the lowest in the peer group. Even that score was inflated by a mathematical error in Petitioner's favor. The math error in Petitioner's favor was the only error that actually affected the scores.

Petitioner's age did not distinguish him from his peer group. Petitioner was only 47 years old at the time of the reduction in force. Simons and Liepold, who were rated higher than Petitioner, were older than Petitioner. Meuser was also in the protected age group and was not significantly younger than Conover. The only member of the peer group who was significantly younger than Conover was Sturgeon, and Petitioner himself admitted that he was not qualified for Sturgeon's position. Notwithstanding the fact that Petitioner's age placed him squarely in the middle of the peer group, Petitioner's brief to the Sixth Circuit falsely asserted that he was the **oldest** person in his peer group.

At trial, Henke explained that while Petitioner did good work, he was not as meticulous, as productive, or as timely with his work as Meuser (his nearest competitor). Meuser also did more to develop the talents of his subordinates, and he invented processes that led to greater team-work within his group. In addition, Meuser handled more complex contracts and made more efforts than Petitioner to develop new industry sources for procurement.

When FERMCO management decided to trim one person from Petitioner's peer group, it selected Petitioner, the lowest rated member of the peer group. In selecting Petitioner for discharge, FERMCO retained two members of Petitioner's peer group who were **older** than Petitioner.

Petitioner was **never** replaced.

On August 9, 1993, 127 salaried employees, including Petitioner, were told that they were being terminated and were immediately taken off their jobs. Nonetheless, FERMCO continued to pay them their full salary and benefits until October 22, 1993, and they also received substantial severance pay after that date.

In addition, FERMCO established an appeals process to let employees who wanted to challenge their termination seek internal review. Petitioner did not file such an appeal.

To help displaced employees find new jobs, FERMCO set up a Resource Center with computers, clerical help and listings of job opportunities both within and outside FERMCO. Resource Center staff also helped displaced employees with their resumés.

At the start of fiscal year 1994, after the displaced employees had been off the job for two months, FERMCO learned that it would have $30 million more than it had expected in available funds. Because these additional funds enabled it to do more work, FERMCO hired more people. Some of the people who had been involuntarily terminated as part of the reduction in force were brought back at this time. But FERMCO did not rehire Petitioner,

nor did it hire anyone to fill his job. Events had proved that FERMCO did not need a procurement group leader in Petitioner's position.

Recognizing the potential legal issues, including discrimination issues, that could arise out of such a large reduction in force in these litigious times, FERMCO took precautions against any sort of discrimination. As part of the forced ranking process, FERMCO instructed its decisionmakers not to discriminate on the basis of age or other prohibited grounds.

Further, FERMCO conducted a statistical analysis of the entire reduction in force after the "forced ranking" process had been completed, but before affected employees had been notified of their termination, to assess whether the reduction in force might have a disparate impact on members of protected groups, including people over 40. Application of a preliminary statistical test called the "fourth-fifths rule" detected no adverse impact in 18 of FERMCO's 20 divisions, but produced a "borderline" result in the acquisition and finance division (which included Petitioner and 141 other salaried employees) and the Administration Division. Esther Hodge, the manager of the Human Resources Department, met separately with the managers of both divisions to discuss the process that they had used and the nature of the "essential skills" on which employees within the respective divisions had been rated. As a result of these discussions, Hodge concluded that the "borderline" results in both divisions were not indicative of discrimination. At trial, unrebutted expert testimony confirmed Hodge's judgment.

The internal appeals process served as a further safeguard against possible discrimination by permitting terminated employees to appeal their discharge on any ground, including discrimination. Petitioner filed no appeal.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION DOES NOT RAISE THE QUESTION PRESENTED IN THE PETITION.

The Sixth Circuit's decision entering judgment as a matter of law for Respondents because Petitioner's evidence was insufficient to establish age discrimination does not present the question asserted by the petition. The Sixth Circuit did not hold that Petitioner had sufficiently established a prima facie case and pretext, but nonetheless needed to present additional evidence of age discrimination. Instead, the Sixth Circuit described the analytical framework for evaluating the sufficiency of the evidence after a jury verdict as follows:

> After a jury verdict, the burden-shifting framework falls away. The question for the court is simply whether there was sufficient evidence to support a finding of age discrimination. However, the elements of that framework remain useful ways of thinking about the evidence and how the jury might reasonably have arrived at its verdict. For example, the elements of the prima facie case, together with the jury's disbelief of the employer's explanation for its actions, are sufficient to support a verdict for the

> employee, although they do not compel such a verdict.

Skalka v. Fernald Environmental Restoration Management Corp., 178 F.3d 414, 421 (6th Cir. 1999) (citations omitted).

Unlike a summary judgment decision, this case involved a motion for judgment as a matter of law after a jury verdict where the Sixth Circuit does not review the existence of a prima facie case. Instead, the Sixth Circuit carefully analyzed the same "evidence" recycled by the petition, and found it insufficient on the ultimate question of whether Petitioner had proven age discrimination.

The petition's academic discussion of "permissive pretext" and "pretext plus" is irrelevant to the resolution of this case. The Sixth Circuit's opinion did not announce any rule regarding "permissive pretext" or "pretext plus." Neither Petitioner nor Respondents even raised the issue of "permissive pretext" or "pretext plus" before the Sixth Circuit. Instead, the parties moved directly to the ultimate question of whether sufficient evidence supported the jury's verdict.

Petitioner's claim that the Sixth Circuit applied a "pretext plus" standard finds no support in the Sixth Circuit's opinion. The Sixth Circuit did not require Petitioner to prove both pretext **and** offer additional evidence of age discrimination. On the contrary, the Sixth Circuit expressly stated that "the elements of the prima facie case, together with the jury's disbelief of the employer's explanation of its actions, are sufficient to support a verdict for the employee, although they do not compel such a verdict." *Skalka*, 178 F.3d at 421.

This case is therefore unlike *Reeves v. Sanderson Plumbing Products, Inc.*, 180 F.3d 263 (5th Cir. April 22, 1999) (unpublished), *cert. granted*, 1999 WL 783937 (Nov. 8, 1999). In *Reeves*, the Fifth Circuit found that:

> To establish pretext, a plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination "had a determinative influence on" the employer's decision-making process.

Appendix at 7. The Fifth Circuit also found:

> Even so, whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision.

Id. at 10. Unlike the Sixth Circuit, the Fifth Circuit noted that "Reeves very well may be correct" that a reasonable jury could have found that Sanderson's explanation for its employment decision was pretextual. *Id.*

This Court should not grant certiorari in this case as it did in *Reeves*. As demonstrated above, the Sixth Circuit did not apply a "pretext plus" standard as the Fifth Circuit did in *Reeves*. Further, the Sixth Circuit did not find that Petitioner had introduced sufficient evidence of pretext.

Petitioner's disagreement with the Sixth Circuit's decision is not based on its analysis of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), but is based instead on the Sixth Circuit's analysis of the sufficiency of the

evidence. The petition itself confirms this point in its discussion of the Seventh Amendment, which would only be implicated if Petitioner's evidence were sufficient to warrant presentation to a jury. *Galloway v. U.S.*, 319 U.S. 372, 389 (1943) ("If the intention is to claim generally that the [Seventh] Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century.").

Because the Sixth Circuit's analysis of the sufficiency of the evidence does not raise the question presented in the petition, the petition should be denied.

II. THE SIXTH CIRCUIT'S FACT-SPECIFIC ANALYSIS OF THE SUFFICIENCY OF THE EVIDENCE IN THIS CASE DOES NOT PRESENT ANY QUESTIONS WARRANTING REVIEW BY THIS COURT.

The Sixth Circuit's fact-based decision that Petitioner's "evidence" of age discrimination was insufficient to support the jury verdict raises no important question warranting this Court's review. The Sixth Circuit's analysis of Petitioner's "evidence" was as follows:

> On the ultimate question of whether he has proven discrimination, however, Conover's evidence is too weak to sustain the verdict. It consists of (1) the fact that Henke discussed the possibility of early retirement with older employees but not younger ones, and two employees in their 50s accepted early retirement; (2) a statement by another supervisor that some employees would be laid off because they

> were "too comfortable"; and (3) the assertion "the oldest" of that supervisor's employees were laid off. Skalka Br. at 5. Conover somehow attributes facts (2) and (3) to Henke. These allegations are vague and unsupported by citations to the record. In addition, we do not believe that the "too comfortable" comment is indicative of age bias.
>
> **Most problematic is that Conover relies heavily on the false assertion that he was the oldest member of his peer group. Skalka Br. at 18.** Thus, Conover has not really provided any argument to support the verdict. The most likely explanation for it seems to be that the jury made the same mistake that Conover has made about the ages of his peers and, finding FERMCO's decision irrational and careless, inferred discrimination. We do not think that a reasonable jury could have reached this conclusion on the basis of the correct facts about Conover's age relative to his peer group.

Skalka, 178 F.3d at 422-23 (citation omitted) (emphasis added).

The Sixth Circuit's fact-based ruling that, as a matter of law, Petitioner's "evidence" was insufficient to establish age discrimination does not present an important question for this Court's review. The petition does not assert that the circuits disagree about the sufficiency of any of the three categories of "evidence" the Sixth Circuit found insufficient. The Sixth Circuit's rejection of Petitioner's false contention that he was the oldest member of his peer group, when Petitioner's age actually placed him in the middle of his peer group, presents no issue requiring further review.

Petitioner's "evidence" of age discrimination would be insufficient under any legal standard. The petition should be denied for this reason as well.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

ROBERT G. STACHLER
Counsel of Record
DOREEN CANTON
KERRY P. HASTINGS
TAFT, STETTINIUS & HOLLISTER LLP
1800 Firstar Tower
425 Walnut Street
Cincinnati, OH 45202-3957
(513) 381-2838

Counsel for Respondents

APPENDIX
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60334

ROGER REEVES,

Plaintiff-Appellee,

versus

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(96-CV-197)

(Filed Apr. 22, 1999)

Before HIGGINBOTHAM, JONES and WIENER, Circuit Judges.

Per Curiam:*

In this age discrimination case, Defendant-Appellant Sanderson Plumbing Products, Inc. ("Sanderson") appeals the district court's order denying Sanderson's post-verdict motion for judgment as a matter of law

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

("JML"), and granting Plaintiff-Appellee Roger Reeves's motion for front pay. After reviewing the record, we conclude that Reeves did not prove a violation of the Age Discrimination in Employment Act ("ADEA") by a preponderance of the evidence. Hence, we reverse the district court's order and render judgment in favor of Sanderson.

I

FACTS AND PROCEEDINGS

Fifty-seven year old Reeves was employed for 40 years by Sanderson – a company involved in the manufacture of toilet seats and covers. At the time of his discharge, Reeves worked in a department of the company known as the Hinge Room. The Hinge Room ran a regular line which was supervised by Reeves, and a special line which was supervised by 35 year old Joe Oswalt. Forty-five year old Russell Caldwell was the manager of the department and he supervised both Reeves and Oswalt.

At all times relevant to this case, a union represented Sanderson's production and maintenance employees. The union contract included general work rules, part of which dealt specifically with attendance. Pursuant to these rules, an employee who was absent from work in excess of five percent of his scheduled hours in a month, or who was late twice in a month, was subject to disciplinary action.

As part of his essential duties as a supervisor, Reeves was required to keep daily, weekly, and monthly records

of the attendance and tardiness of employees under his control. These records were reviewed by Reeves for accuracy before he passed them on to Caldwell, who then sent them on to data processing.

In the fall of 1993, Sanderson's Department of Quality Control – under the direction of Powe Chesnut – conducted a review of the operating procedures in the Hinge Room. According to Sanderson, the study revealed productivity problems on Reeves's regular line, stemming from a lax assembly line operation. As a result, Reeves was placed on a 90-day probation for unsatisfactory work performance.

Nearly three years later, in the summer of 1995, Caldwell informed Chesnut – who by this time had become Director of Manufacturing – that the Hinge Room was again having difficulty meeting its production requirements due to pervasive absenteeism and tardiness. Because the Hinge Room records did not reflect employee attendance problems, however, Chesnut requested that Lucille Reeves, then-Manager of Quality Control, conduct an audit of the department's time sheets. This investigation revealed numerous timekeeping errors and misrepresentations on the part of Caldwell, Reeves, and Oswalt. Dana Jester, Vice President of Human Resources, conducted an independent review of the records, and confirmed Quality Control's findings. Armed with these results, Chesnut, Jester, and Vice President of Operations Tom Whitaker, recommended to Company President Sandra Sanderson[1] that Caldwell and Reeves be

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[1] The record is uncontradicted that Ms. Sanderson had married Chesnut in December 1988.

dismissed.[2] Ms. Sanderson – who was 52 years old at the time – heeded this advice, firing both Caldwell and Reeves in October 1995. Thereafter, Sanderson filled Reeves's position, on three successive occasions, with men in their thirties.

In June 1996, Reeves filed suit, claiming that Sanderson terminated him because of his age, in violation of the ADEA. Reeves based his claim on two age-related statements allegedly made by Chesnut several months before Reeves's dismissal, namely (1) that Reeves was so old that he "must have come over on the Mayflower," and (2) that he was "too damn old to do the job."

At the conclusion of the trial, the jury returned a verdict in favor of Reeves, awarding him $35,000 and finding that Sanderson discriminated willfully on the basis of age in its adverse employment action. After the verdict, Sanderson renewed its previous motion for JML, and moved, in the alternative, for a new trial. At the same time, Reeves filed a motion seeking front pay. The district court denied Sanderson's motions, and entered judgment in favor of Reeves in the amount $70,000 – adding $35,000 in liquidated damages to the jury's compensatory damages in that amount based on the jury's determination of

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[2] Chesnut testified at trial that, had Oswalt not voluntarily terminated his employment several months earlier, Oswalt would have been subject to dismissal along with his co-workers, Reeves and Caldwell.

willfulness.[3] In addition, the court awarded Reeves $28,490.80 in front pay, representing two years of lost income. Sanderson timely filed a notice of appeal.

II

ANALYSIS

A. Standard of Review

"A motion for judgment as a matter of law . . . in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict."[4] We review the denial of such motions *de novo*, applying the same standard as the district court.[5] A JML is appropriate if the "facts and inferences point so strongly and overwhelmingly in favor of one party that a reasonable jury could not have concluded" as the jury did.[6] Applying this standard to the instant case, the district court's judgment should be reversed only if "there is no legally sufficient evidentiary basis for a reasonable jury to find" that Sanderson discharged Reeves because of his age.[7]

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[3] *See* 29 U.S.C. § 626(b) (1990) (providing that "liquidated damages shall be payable only in cases of willful violations of this Act.").

[4] *Harrington v. Harris*, 118 F.3d 359, 367 (5th Cir. 1997).

[5] *Nichols v. Lewis Grocer*, 138 F.3d 563, 565 (5th Cir. 1998).

[6] *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 148 (5th Cir. 1995).

[7] FED. R. CIV. PROC. 50 (a)(1).

B. The ADEA

The ADEA makes it "unlawful for an employer . . . to discharge any individual . . . because of such individual's age."[8] To establish a violation of the ADEA, a plaintiff must prove, by a preponderance of the evidence, intentional discrimination on the part of his employer.[9] As direct evidence of discrimination is rare, plaintiffs may rely on indirect evidence and reasonable inferences to establish an ADEA claim under the *McDonnell Douglas* burden-shifting analysis.[10]

Under this analysis, a plaintiff must first present a prima facie case, thereby establishing a rebuttable presumption of age discrimination.[11] If the plaintiff meets this burden, the employer must then rebut the presumption by articulating a legitimate, nondiscriminatory reason for the challenged employment action.[12] If the employer presents such evidence, then the presumption of discrimination fades, and the plaintiff must prove that

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[8] 29 U.S.C. § 623(a)(1) (1990).

[9] *Price v. Marathon Cheese Corp.*, 119 F.3d 330, 336 (5th Cir. 1997).

[10] *Id.*

[11] *Id.* There are four elements to a prima facie case of discriminatory discharge under the ADEA, including proof that the plaintiff was (1) discharged; (2) qualified for the position; (3) within the protected class at the time of the discharge; and (4) either i) replaced by someone outside the protected class, ii) replaced by someone in the protected class but younger than the plaintiff, or iii) otherwise discharged because of his age. *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993).

[12] *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 654 (5th Cir. 1996).

the employer's articulated reason is a pretext for unlawful discrimination.[13]

To establish pretext, a plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination "had a determinative influence on" the employer's decision-making process.[14] Age-related comments may serve as sufficient evidence of discrimination if the remarks are (1) proximate in time to the termination; (2) made by an individual with authority over the challenged employment decision; and (3) related to that employment decision.[15] Mere "stray remarks" – i.e., comments which are "vague and remote in time" – however, are insufficient to establish discrimination.[16]

1. Sufficiency of the Evidence

On appeal, Sanderson does not challenge the sufficiency of the evidence supporting Reeves's prima facie case of age discrimination.[17] Rather, Sanderson argues

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[13] *Price*, 119 F.3d at 337.

[14] *Id.*

[15] *Brown*, 82 F.3d at 655.

[16] *Id.*; *Price*, 119 F.3d at 337.

[17] Indeed, when, as here, a case has already been tried on the merits, whether the plaintiff properly made out a prima facie case is no longer relevant. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). Instead, the important inquiry is whether the plaintiff has "produced sufficient evidence for a jury to find that discrimination has occurred." *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 123 (5th Cir. 1992).

that it articulated a legitimate, nondiscriminatory explanation for firing Reeves: Reeves's shoddy record keeping. Because Reeves failed to offer evidence sufficient to prove *both* that this reason is untrue *and* that age is what really triggered Reeves's discharge, argues Sanderson, it is entitled to judgment as a matter of law. We agree.

At trial, Chesnut testified that he became aware of timekeeping problems in the Hinge Room after Caldwell – the department manager – complained of inadequate production resulting from absenteeism. This complaint prompted an investigation which uncovered numerous errors in the department's attendance records. Because of specific misrepresentations and errors made by Reeves, argues Sanderson, employees under Reeves's control were being paid for time they did not work, and were not being disciplined for their habitual absenteeism and tardiness. Reeves testified that he was familiar with the company's attendance policy, as well as his timekeeping responsibilities as a supervisor under that policy. In light of this admission, argues Sanderson, Reeves's failure to keep accurate records in accordance with the policy amounts to unsatisfactory work performance, which is a legitimate, nondiscriminatory basis for dismissal.

Reeves attempts to cast suspicion on Sanderson's proffered explanation by first asserting that Sanderson's explanation changed between the time of Reeves's discharge and trial. When he was fired, claims Reeves, he was told that he had caused a *specific* employee to be paid for time she had not actually worked. In contrast, Reeves argues, Sanderson defended its employment decision at trial by claiming that Reeves's timekeeping mistakes had resulted in the overpayment of *numerous* employees.

Although proof that an employer lied to its employee about its reasons for discharge does, under some circumstances, raise a "red flag" of pretext,[18] the inconsistency noted by Reeves in this case can hardly be considered mendacious. Sanderson has, at all times, supported its decision to fire Reeves with the charge that Reeves's work performance was unsatisfactory. That Sanderson may have explained this charge at the time of dismissal with only one instance of inaccurate record keeping, but buttressed its defense by adducing evidence of other similar infractions at trial smacks more of competent trial preparation than telling a lie.

Reeves goes on, however, to challenge the veracity of Sanderson's allegation that he engaged in inaccurate record keeping at all. At trial, Reeves testified that he was always very careful to ensure that his employees arrived at their work stations on time. In addition, he claimed that any employee who was permitted to clock in early or stay late – and thereby receive additional pay – had extra work assignments to perform. According to Reeves, if any record keeping errors were made, they were the result of Caldwell's inattentiveness and not his own. Moreover, Reeves points out, at trial Chesnut was unable to testify as to the cost to the company, if any, of Reeves's alleged record falsifications. Based on this evidence, claims Reeves, a reasonable jury could have found that Sanderson's explanation for its employment decision was pretextual.

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[18] *Haun v. Ideal Indus., Inc.*, 81 F.3d 541, 546 (5th Cir. 1996).

On this point, Reeves very well may be correct. Even so, whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision.

In an attempt to satisfy this burden at trial, Reeves testified that Chesnut – while serving as Director of Manufacturing – made the above-quoted age-related comments just months before Reeves was terminated. As Chesnut was one of three people who recommended his termination to Ms. Sanderson, argues Reeves, Chesnut's comments should be taken as sound evidence of the company's underlying discriminatory motives.

Reeves also expressed the belief that he was treated less favorably than Sanderson's younger employees. This belief, Reeves now claims, is confirmed by Oswalt's testimony that Chesnut treated Reeves like a child. As further evidence of Sanderson's disparate treatment, Reeves points to his 1993 probation, and notes that the 30-something Oswalt was not put on probation despite a similarly lagging production level on the Hinge Room's special line. Likewise, argues Reeves, when Quality Control initiated its investigation of his timekeeping records in 1995, none of the supervisors from other departments were singled out for such scrutiny.

Considering all of the evidence in a light most favorable to Reeves, we nevertheless conclude that there was insufficient evidence for a jury to find that Sanderson

discharged Reeves because of his age. Despite the potentially damning nature of Chesnut's age-related comments, it is clear that these comments were not made in the direct context of Reeves's termination. In addition, Chesnut was just one of three individuals who recommended to Ms. Sanderson that Reeves be terminated, and there is no evidence to suggest that any of the other decision makers were motivated by age. In fact, the record shows that at least two of the decision makers were themselves over the age of 50 – Ms. Sanderson at 52, and Jester at 56. Furthermore, the fact remains that, as a result of the 1995 investigation, each of the three Hinge Room supervisors was accused of inaccurate record keeping, including not only Reeves and Caldwell, but 35 year old Oswalt as well. Finally, there is evidence that, at the time Reeves was dismissed, 20 of the company's management positions were filled by people over the age of 50, including several employees in their late 60's.

Based on our plenary review, we find that Reeves did not introduce sufficient evidence of age discrimination to support the jury's finding of liability under the ADEA. For this reason, we reverse and render judgment in favor of Sanderson.

REVERSED AND RENDERED.